

must maintain payroll records, as specified in § 655.1113, and make such records available to the Administrator in the event of an enforcement action pursuant to subpart M.

(d) *Working conditions.* To meet the requirement of no adverse effect on working conditions, the facility must attest that it will afford equal treatment to U.S. and H-1C nurses with the same seniority, with respect to such working conditions as the number and scheduling of hours worked (including shifts, straight days, weekends); vacations; wards and clinical rotations; and overall staffing-patient patterns. In the event of an enforcement action pursuant to subpart M, the facility must provide evidence substantiating compliance with this attestation.

[65 FR 51149, Aug. 22, 2000, as amended at 73 FR 78068, Dec. 19, 2008]

§ 655.1113 Element III—What does “facility wage rate” mean?

(a) The third attestation element requires that the facility employing or seeking to employ the alien must attest that “the alien employed by the facility will be paid the wage rate for registered nurses similarly employed by the facility.”

(b) The facility must pay the higher of the wage required in this section (*i.e.* facility wage), or the wage required in § 655.1112 (*i.e.*, prevailing wage).

(c) *Wage obligations for H-1C nurses in nonproductive status*—(1) *Circumstances where wages must be paid.* If the H-1C nurse is not performing work and is in a nonproductive status due to a decision by the facility (*e.g.*, because of lack of assigned work), because the nurse has not yet received a license to work as a registered nurse, or any other reason except as specified in paragraph (c)(2) of this section, the facility is required to pay the salaried H-1C nurse the full amount of the weekly salary, or to pay the hourly-wage H-1C nurse for a full-time week (40 hours or such other number of hours as the facility can demonstrate to be full-time employment) at the applicable wage rate.

(2) *Circumstances where wages need not be paid.* If an H-1C nurse experiences a period of nonproductive status due to conditions unrelated to employment

which take the nurse away from his/her duties at his/her voluntary request and convenience (*e.g.*, touring the U.S., caring for ill relative) or render the non-immigrant unable to work (*e.g.*, maternity leave, automobile accident which temporarily incapacitates the non-immigrant), then the facility is not obligated to pay the required wage rate during that period, *provided that* such period is not subject to payment under the facility's benefit plan. Payment need not be made if there has been a *bona fide* termination of the employment relationship, as demonstrated by notification to USCIS that the employment relationship has been terminated and the petition should be canceled.

(d) *Documentation.* The facility must maintain documentation substantiating compliance with this attestation element. The public access file shall contain the facility pay schedule for nurses or a description of the factors taken into consideration by the facility in making compensation decisions for nurses, if either of these documents exists. Categories of nursing positions not covered by the public access file documentation shall not be covered by the Attestation, and, therefore, such positions shall not be filled or held by H-1C nurses. The facility must maintain the payroll records, as required under the Fair Labor Standards Act at 29 CFR part 516, and make such records available to the Administrator in the event of an enforcement action pursuant to subpart M of this part.

§ 655.1114 Element IV—What are the timely and significant steps an H-1C employer must take to recruit and retain U.S. nurses?

(a) The fourth attestation element requires that the facility attest that it “has taken and is taking timely and significant steps designed to recruit and retain sufficient registered nurses who are United States citizens or immigrants who are authorized to perform nursing services, in order to remove as quickly as reasonably possible the dependence of the facility on non-immigrant registered nurses.” The facility must take at least two such steps, unless it demonstrates that taking a second step is not reasonable. The steps described in this section shall not